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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 602

UNITED STATES OF AMERICA, PETITIONER

v.

MICHELE DADDONA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit (R. 35), affirming an order of the District Court for the District of Connecticut (R. 23, 26-27) granting respondent's petition for naturalization.

OPINION BELOW

The opinion of the Court of Appeals (R. 33-34) is reported at 170 F. 2d 964.

JURISDICTION

The judgment of the Court of Appeals was entered November 29, 1948 (R. 35). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether the statutory requirement, that no alien shall be naturalized unless he has been a person of good moral character during the five-year period preceding the filing of his petition for naturalization, may be fulfilled merely by proof that he has behaved as a person of good moral character during such period.

2. Whether an alien, who has been imprisoned on a manslaughter conviction for a major portion of the five-year period preceding the filing of his petition, can offer evidence of good behavior during incarceration as proof that he has been a person of good moral character during the statutory period.

STATUTE INVOLVED

Section 307(a) of the Nationality Act of 1940, 54 Stat. 1142, 8 U. S. C. 707(a), provides in pertinent part:

> No person * * * shall be naturalized unless such petitioner, (1) immediately preceding the date of filing petition for naturalization has resided continuously within the United States for at least five years * * *, and (3) during all [that period] has been and still is a person of good moral character, attached to the principles of the Constitution of the United

States, and well disposed to the good order and happiness of the United States.

STATEMENT

Michele Daddona, the respondent, a native of Italy, was born in 1899. He came to this country some time prior to 1915, and apparently has resided in Connecticut almost continuously since that time, with the exception of the years between 1921 and 1927, which he spent in Italy. After establishing a residence in Cuba in 1940, he made a lawful entry for permanent residence in the United States on May 21, 1940, and on July 22, 1940, filed in a Connecticut state court his declaration of intention to become a citizen. (R. 5, 6, 7, 17-18.)

On June 6, 1942 (R. 4), respondent, apparently while he was intoxicated, killed a man (see R. 23). He was indicted for second degree murder in a Connecticut state court, but pleaded guilty to manslaughter and on September 23, 1942, was sentenced to confinement in a state prison for a term of two years and eight months to five years (R. 2-3). After serving about three years and four months of his sentence, he was released in December 1945 (R. 14, 18). He was granted a pardon for the offense by the State of Connecticut on May 5, 1947 (R. 4).

On July 18, 1947, a year and a half after his release from prison and five years and six weeks after the homicide, respondent filed a petition for naturalization in the District Court for the District

of Connecticut (R. 5-10). At the hearing, his previous record was put in evidence, showing a conviction for drunkenness in 1932, an arrest in 1941 for breach of peace and intoxication on which the bond was called, the homicide in 1942, and his imprisonment from 1942 to 1945 (R. 14, 15-16). The Immigration and Naturalization Service argued that respondent was precluded from establishing that he was a person of good moral character during the statutory five-year period preceding the filing of the naturalization petition, i. e., from July 18, 1942, to July 18, 1947, because during a major portion of that time he was under moral restraint in prison and was not a free agent. The Service also argued that, in view of the fact that the crime had been committed just before the beginning of the five-year period, respondent had not offered sufficient evidence of reform to prove that he was of good moral character throughout the full period. (R. 13-14, 18, 22-23.) Respondent presented evidence of the pardon, of exemplary conduct during his confinement in prison, and of a general reputation for good moral character since 1928 (R. 9-10, 16-17, 19-22). The district court found that since June 6, 1942,[1] respondent had "behaved as a person of good moral character" (R. 26). On the basis of this finding, the court concluded that he was eligible

[1] This was the date of the homicide (R. 4). The court's finding erroneously states that this was the date of sentence (R. 26). Sentence was pronounced on September 23, 1942 (R. 2-4).

for citizenship and granted the petition for naturalization (R. 12, 22, 27).

On appeal to the Court of Appeals for the Second Circuit, the Government argued that respondent could not be said to have proved that his moral character was good during the five-year statutory period in view of the fact that he had committed a felonious homicide a few weeks before the period began and had spent a good part of it in prison. But the Court of Appeals held that a felony committed before the commencement of the five-year period could not be considered on the issue of respondent's good moral character during that period. The court further held that imprisonment during a large part of the five-year period was not decisive as a matter of law, but that respondent's behavior during imprisonment was a factor to be considered in determining the quality of his character. The judgment was accordingly affirmed. (R. 33-35.)

REASONS FOR GRANTING THE WRIT

The award of citizenship is a process of extreme importance, which "touches the very well-being of the Nation." *Baumgartner* v. *United States,* 322 U. S. 665, 676. Congress has fixed the conditions under which naturalization may be granted in order to make certain that the gift of citizenship will be beneficial to the United States as well as to the alien. *Luria* v. *United States,* 231 U. S. 9, 23. And this Court has insisted upon strict compliance with the congressional mandate. *United States* v. *Ness,*

245 U. S. 319; *United States* v. *Ginsberg*, 243 U. S. 472. The alien bears the burden of establishing that he possesses the specified qualifications (*United States* v. *Macintosh*, 283 U. S. 605; *Maney* v. *United States*, 278 U. S. 17) and it seems clear that when there is doubt whether citizenship should be awarded, such doubt should generally be resolved in favor of the United States and against the alien. *United States* v. *Manzi*, 276 U. S. 463, 467; cf. *Schneiderman* v. *United States*, 320 U. S. 118, 122. The statutory requirements contemplate the creation of a stable and permanent status, not easily dislodged once it has vested. *Schneiderman* v. *United States, supra.* Consequently, this Court has warned that the standards of proof imposed upon the alien are not to be relaxed so as "to weaken in the slightest the alertness with which admission to American citizenship should be safeguarded." *Baumgartner* v. *United States, supra.*

Congress, in the statute with which we are here concerned, has prescribed that no alien shall be admitted to citizenship unless he demonstrates that during the five-year period preceding the filing of his naturalization petition he "has been * * * a person of good moral character, * * * and well disposed to the good order and happiness of the United States." In this case, respondent committed a felonious homicide just six weeks before the commencement of the five-year period and as a result spent over two-thirds of the period in prison.

We do not see how, in such circumstances, the alien can meet the burden of proof requiring him to show that he has been for the requisite period a person of good moral character, well disposed to the good order of our society. Manifestly, Congress intended the five-year probationary period as a test of the alien's fitness to bear the burdens and enjoy the privileges of a free citizen in a free society. We think respondent should be required to wait until he has fulfilled that clear statutory requirement.

1. The district court concluded that respondent was eligible for citizenship upon the basis of a finding that he had "behaved" as a person of good moral character since the date of the manslaughter conviction. Thus, it would seem that the court looked on behavior only during the five-year period as the criterion of eligibility, and thought that the felonious homicide, being prior to that period, could not be considered in bar of naturalization. In affirming, the Court of Appeals expressly held that that offense was no bar to naturalization.

An examination of naturalization cases in the Second Circuit reveals that that court has held consistently that the only test of an alien's moral fitness is his "behavior" during the five-year period and that previous offenses are not to be considered. Thus, in *United States* v. *Clifford,* 89 F. 2d 184, an alien was refused naturalization because of an offense committed less than five years before the

filing of his application. But the court assumed that another offense committed six years prior to the application would be insufficient to bar citizenship. In *Petition of Zele,* 127 F. 2d 578 at 580, the court said, "Good behavior *during the five year period* is the only test of moral fitness provided in the statute," and it held that it "would not be reasonable to infer misbehavior during that period" from the alien's entanglement in some fraudulent dealings nine years prior to the date of his petition. See also *Petition of Zele,* 140 F. 2d 773. Finally, in *Repouille* v. *United States,* 165 F. 2d 152, the court reversed a grant of naturalization to an alien, whose petition had been filed on September 22, 1944, because the record showed that he had committed a "mercy killing" of his idiot son on October 12, 1939. But the court said that "if he had waited before filing his petition from September 22, to October 14, 1944, he would have had a clear record for the necessary period, and would have been admitted without question." 165 F. 2d at 153. In thus strictly limiting the test of moral fitness to behavior during the five-year period, the Court of Appeals for the Second Circuit has, in our opinion, misinterpreted the statute and has decided the instant case in a manner conflicting with certain holdings of this Court and with a long line of decisions in the district courts.

Prior to the adoption of the Nationality Act of 1940, the applicable statute provided that an alien

seeking citizenship was required to show to the satisfaction of the court that during the five years immediately preceding the application he had "behaved as a man of good moral character."[2] The Court of Appeals for the Second Circuit, as we have shown, interpreted the word "behaved" in its strictest and most literal sense, and it has carried that interpretation over into the present statute. But this Court has said, in interpreting the old statute, that "proof of good behavior does not close the inquiry," and that "it is obvious that Congress regarded the *fact* of good character * * * as * * * of the first importance." *United States* v. *Macintosh*, 283 U. S. 605, 616-617; see also *Schneiderman* v. *United States*, 320 U. S. 118, 133-135. If the test is "good moral character" throughout the statutory five years, and not merely objective behavior during that period, we think it obvious that the naturalization court should consider the effect of prior crimes, particularly where a heinous offense or series of offenses was committed within a few short weeks of the commencement of the period, for the alien "cannot change his character

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[2] Section 4 of the Act of June 20, 1906, 34 Stat. 596, 598, 8 U.S.C. 382, provided in pertinent part:

"It shall be made to appear to the satisfaction of the court admitting any alien to citizenship that immediately preceding the date of his application he has resided continuously within the United States five years at least, and within the State or Territory where such court is at the time held one year at least, and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. * * *"

or his attitude toward society over night any more than the 'leopard can change his spots.' " *In re Taran,* 52 F. Supp. 535, 540 (D. Minn.).[3] This has been the rule followed in a long line of district court cases. *In re Lipsitz,* 79 F. Supp. 954 (D. Md.); *Petition of Boric,* 61 F. Supp. 133 (D. Ore.); *Petition of Gabin,* 60 F. Supp. 750 (N. D. Cal.); *In re Laws,* 59 F. Supp. 179 (N. D. Cal.); *In re Balestrieri,* 59 F. Supp. 181 (N. D. Cal.); *In re Bocchiaro,* 49 F. Supp. 37 (W. D. N. Y.); *Petition of Ludecke,* 31 F. Supp. 521 (E. D. Mich.); *In re DeMayo,* 26 F. Supp. 996, 998 (W. D. Mo.); *United States* v. *Etheridge,* 41 F. 2d 762 (D. Ore.); *In re McNeil,* 14 F. Supp. 394 (N. D. Cal.); *In re Caroni,* 13 F. 2d 954 (N. D. Cal.); *In re Ross,* 188 Fed. 685 (M. D. Pa.).[4] In fact, the last two cases, which have often been cited and apparently never questioned,[5] go to the extreme of holding that the commission of murder or manslaughter forever bars naturalization.

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[3] The fact that petitioner eventually received a pardon does not, of course, preclude consideration of the offense when the issue is his moral character during a period preceding the granting of the pardon.

[4] It is also the interpretation adopted by the Immigration and Naturalization Service in its regulations. 8 Code of Federal Regulations, 1947 Supp., 353.3 provides: "*Period during which good moral character must be established.* The investigation of the petitioner's attitude, behavior, and conduct shall be extended beyond the period or periods prescribed by the Nationality Act of 1940 if there is reason to believe that such investigation is necessary to a proper determination of the case. The results of the investigation shall be reported by the naturalization officer to the appropriate naturalization court."

[5] The *Ross* case was cited by this Court in *United States* v. *Macintosh,* 283 U.S. at 617.

Moreover, the revision of the language of the statute in the Nationality Act of 1940 is, we think, significant. The original phrase, "behaved as a man of good moral character," has now become, "has been and still is a person of good moral character." There is no explanation of this change in the legislative history of the Act. However, the committee which drafted the revision indicated that this section was looked on as a restatement of existing law.[6] The most likely explanation would seem to be that it was intended as an adoption of this Court's decision in the *Macintosh* case, *supra*.

We submit that the Second Circuit rule, in prohibiting the naturalization court from weighing the alien's character in the light of earlier offenses, unduly relaxes the strict safeguards which Congress and this Court have erected to insure that the privilege of citizenship will be granted only to those who are worthy.

2. The Court of Appeals held that an alien, who has been incarcerated on a conviction involving moral iniquity for the greater part of the five-year period preceding the date of his petition, can nevertheless satisfy the statutory requirement of good moral character throughout that period by proof that his behavior while in prison was exemplary. In our opinion, this could not have been the intention of Congress. We think this unnecessarily

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[6] See the discussion in *Schneiderman* v. *United States*, 320 U.S. 118, 133-134, footnote 12.

weakens the strict standards of proof which both Congress and this Court have imposed in naturalization cases, and relaxes "the alertness with which admission to American citizenship should be safeguarded." *Baumgartner* v. *United States,* 322 U. S. at 676. We think respondent should, as a matter of law, be required to wait until he has been free at least five years.

Here again, the Court of Appeals for the Second Circuit has, we feel, been misled by its adherence to the "behavior" test. If the only test of good moral character prescribed by the statute were objective behavior, then, of course, behavior in prison would be competent evidence. But we have already shown that the test is a more exacting one. Congress did not require of the alien merely that he succeed, perhaps perforce, perhaps even through ulterior motive, in behaving for five years as a person of good moral character. Congress prescribed that the alien must have been in fact a person of such character for the full probationary period.

Obviously, one who has been convicted of a heinous offense was not a person of good moral character at the time the offense was committed, and we submit that during incarceration there is no adequate opportunity for demonstration that such character has been acquired. Morality necessarily presupposes freedom of action. We think that a man who has committed a crime involving moral turpitude and who, in expiation of his crime, is

incarcerated and forced to lead a life which precludes opportunity to manifest his character in a free society, is likewise precluded from relying upon his good conduct during imprisonment as evidence that he has attained the good moral character required of an applicant for citizenship. "Morals, after all, must involve intention," *Petition of Lieberman,* 50 F. Supp. 121, 122 (E. D. N. Y.), and a convict's behavior, being in the main under restraint and imposed from without, is not an adequate gauge of his inner intent. His activities are narrowly circumscribed; he is under continuous observation; he must conform to rigorous rules and is subject to severe punishment for deviations; he has no real freedom of choice. In our opinion he cannot meet the statutory test.

There have been a number of decisions in the lower courts which conflict with that of the Court of Appeals in this case. We have been able to find but one other reported case which squarely treats the issue of the competence of evidence of a prisoner's good behavior as proof of good moral character. That case held that a convict cannot establish good character even while free on parole. *In re McNeil,* 14 F. Supp. 394 (N. D. Cal.); and see also *In re Bookschnis,* 61 F. Supp. 751 (D. Ore.); *In re Taran,* 52 F. Supp. 535 (D. Minn.). We need not and do not urge this extreme view, and we are informed that this decision no longer reflects the position of the Immigration and Naturalization Serv-

ice. But we are also informed by the Service that there have been numerous recent unreported cases involving conviction of a serious crime just before commencement of the statutory period and service of the resulting prison sentence during a substantial portion of the period. In almost all of these cases the petition was denied upon adverse recommendation by the Service.[7]

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[7] We are informed that petitions were denied in the following unreported cases: *Joseph Dos Santos*, Pet. No. 36007, December 13, 1946 (Sup. Ct., Taunton, Mass.); *Schye Oseck*, Pet. No. 113940, June 18, 1945 (S.D. Cal.); *George Patrick Shelley*, Pet. No. 7509, April 25, 1946 (Sup. Ct., San Jose, Cal.); *Joseph Leone Guezzetti*, Pet. No. 274331, December 18, 1944 (D. Mass.); *Emory Klein*, Pet. No. 491704, June 20, 1946 (S.D.N.Y.); *John Trakas*, Pet. No. 417978, November 15, 1945 (E.D.N.Y.); *Romeo Philoxenides*, Pet. No. 107688, January 25, 1946 (N.D. Ohio); *Warren Delano Weisskopf*, Pet. No. 301959, November 8, 1944 (N.D. Ill.): *Thomas Ruggieri*, Pet. No. 19841, July 10, 1944 (D. Md.); *Domenic Rizzuti*, Pet. No. 251486, December 18, 1944 (D. Mass.); *Michele Gagliano*, Pet. No. 79107, June 18, 1945 (D.N.J.); *Vassilios Katramados*, Pet. No. 273890, September 17, 1945 (D. Mass.); *Dusan Lukac*, Pet. No. 393984, November 24, 1944 (S.D.N.Y.); *Morris Lit*, Pet. No. 360014, March 8, 1945 (E.D.N.Y.); *Maggiorino Daglio*, Pet. No. 5936, July 9, 1946 (Sup. Ct. Contra Costa County, Martinez, Cal.).

CONCLUSION

The revised statutory requirement that an applicant for citizenship be a person of good moral character has never been interpreted by this Court, and the questions here presented are important in the administration of the naturalization laws. The decision below constitutes a relaxation of the safeguards which Congress and this Court have erected to prevent the cheapening of the privilege of American citizenship. There is no injustice to respondent in insisting that his character undergo the normal five-year test. We respectfully submit that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

FEBRUARY, 1949.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 602

UNITED STATES OF AMERICA, PETITIONER

v.

MICHELE DADDONA, RESPONDENT

CONCERNING A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The respondent prays that the petition for a writ of certiorari be denied and that an order enter affirming the judgment of the Court of Appeals for the Second Circuit which affirmed an order of the District Court for the District of Connecticut granting respondent's petition for naturalization.

OPINION BELOW

The opinion of the Court of Appeals is reported at 170 F. 2d 964.

JURISDICTION

The judgment of the Court of Appeals was entered November 29, 1948. The Solicitor General, on behalf of the United States, contends that this Court has jurisdiction under 28 U. S. C. 1254 (1); however, the respondent respectfully submits that this Court does not have jurisdiction because of the failure of the petitioner to comply with the rules of the Supreme Court (Rule 38, par. 3). The petition for a writ of certiorari was filed in the United States Supreme Court on February 25, 1949, but the notice of the filing of the petition was not served by the petitioner on counsel for respondent until March 10, 1949, and for that reason, service was not accepted.

Rule 38, par. 3 of the Rules of the Supreme Court provides:

> Notice of the filing of the petition, together with a copy of the petition, printed record, and supporting brief shall be served by the petitioner on counsel for the respondent within ten days after the filing (unless enlarged by the court or a justice thereof), and due proof of service shall be filed with the clerk.

In **Seas Shipping Company v. Sieracki,** 328 U. S. 85, the respondents had not been served in accordance with Rule 38, par. 3 and the court held " . . . we are precluded from making any determination concerning their rights or liabilities, with relation either to petitioner or to respondent." Therefore, the respondent prays that the petition for a writ of certiorari be dismissed for lack of jurisdiction.

QUESTION PRESENTED

Whether a person who has been confined in a penal institution for a portion of the five-year statutory period immediately preceding his application for citizenship can establish good moral character during the said five-year period.

STATUTE INVOLVED

Section 307(a) of the Nationality Act of 1940, 54 Stat. 1142, 8 U. S. C. 707(a)

> No person, except as hereinafter provided in this chapter, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing petition for naturalization has resided continuously within the United States for at least five years and within the State in which the petitioner resided at the time of filing the petition for at least six months, (2) has resided continuously within the United States from the date of the petition up to the time of admission to citizenship, and (3) during all the periods referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States.

STATEMENT

The respondent was admitted to citizenship in the District Court of the United States on May 14, 1948. Previous to this, he had been involved in an affray in which one Frank Caruso lost his life. This incident occurred on the 6th day of June, 1942, and on September 23, 1942, the respondent pleaded guilty to a charge of manslaughter in the Connecticut Superior Court and was sentenced by said court to the state prison for a term of from two years and eight months to five years. The Board of Pardons of the State of Connecticut, after a full hearing at which the Department of Immigration and Naturalization was represented, granted a pardon to the respondent on the 5th day of May 1947. Pursuant to the provisions of the naturalization law, a petition for naturalization was filed by the respondent on July 18, 1947. On May 14, 1948, the respondent appeared in the United States District Court of Connecticut at Hartford for a hearing on his right to be admitted to citizenship. This application was opposed by the Department of Immigration and Naturalization. At this hearing, the respondent presented evidence of the pardon, of exemplary conduct during his confinement in prison and of a general reputation for good moral character for the prescribed period. At the completion of the evidence, the District Court found that since June 6, 1942, respondent had behaved as a person of good moral character. On the basis of this finding, the court concluded that he was eligible for citizenship and granted the petition for naturalization.

On appeal to the Court of Appeals for the Second Circuit, the Court of Appeals held that the crime committed on June 6, 1942, several weeks before the commencement of the five-year period, was no bar to the respondent's naturalization. The court further held that good behavior during incarceration may be one indication of the fitness

of the respondent to assume the duties of citizenship, and that good moral character for the prescribed period is a question of fact. The judgment of the District Court for the District of Connecticut was affirmed.

REASONS FOR DENYING THE WRIT

The first question which the petitioner presents is:

> Whether the statutory requirement, that no alien shall be naturalized unless he has been a person of good moral character during the five-year period preceding the filing of his petition for naturalization, may be fulfilled merely by proof that he has behaved as a person of good moral character during such period.

The respondent respectfully submits that this question is not properly raised here in a petition for a writ of certiorari since it was not presented to the court below for decision. Not only did the petitioner fail to assign this question as error before the Court of Appeals for the Second Circuit, but on the appeal from the District Court, it contended that a large group of courts have concluded that the prescribed period is the only test of moral fitness provided in the statute and it also submitted that the view was a sound one and was consonant with the strict provisions of the statute in question.

It is a general rule and a well settled practice that questions not made on the trial or presented to the court below for decision cannot be entertained here in this Court. **Barrow v. Reab,** 9 Howard 366, 370; **Garland v. Davis,** 4 Howard 131, 143. The petitioner is now estopped from raising this question since the point was not brought to the

attention of the court below. **Springer v. United States,** 102 U. S. 586, 593. This point was not raised prior to the petition for a writ of certiorari and should not be considered by this Court. **Helvering v. The Minnesota Tea Co.,** 296 U. S. 380; **Pacific States Box & Basket Co. v. White,** 296 U. S. 176, 186. In **United States v. Atkinson,** 297 U. S. 157, 159, the Government by its assignment of errors assailed the correctness of a ruling and since examination of the record disclosed that no such objection was presented to the lower court, this Court held that the Government was precluded from raising the question on appeal. In **United States v. Classic,** 313 U. S. 299, 329, this Court reiterated that "a point apparently raised and discussed for the first time in the Government's brief in this Court" would not be considered by this Court. **Owens v. The Union Pacific R. R. Co.,** 319 U. S. 715, 725; **Sonzinsky v. United States,** 300 U. S. 506; **Waterloo Distilling Corp. v. United States,** 282 U. S. 577; and **Burnet v. Commonwealth Improvement,** 287 U. S. 415, 418. This Court has further held that the only time it would consider a question not raised below is when the question raised is in support of the judgment rendered below. **Marshall v. Plitz,** 317 U. S. 383, 390.

In the event that this Court shall deem it proper to consider the above question, the respondent submits that the statutory requirement that no alien shall be naturalized unless he has been a person of good moral character during the five-year period preceding the filing of his petition for naturalization may be fulfilled merely by proof that he was a person of good moral character during such period. See **Petition of Zele,** 127 F. 2d 578, 580, 140 F. 2d 773 (C. C. A. 2); **United States v. Clifford,** 89 F. 2d 184 (C. C. A. 2); **United States v. Rubia,** 110 F. 2d 92 (C. C. A. 5); **In re Aldecoa,** 22 F. Supp. 659, 661 (Idaho).

The statute in question has consistently been construed liberally so as to sanction forgiveness after the expiration of five years from the date of a despairing misdeed. See **In re Trum,** 199 F. 361 (U. S. D. C., W. D. Mo.); **In re Centi,** 217 F. 833 (U. S. D. C., W. D. Tenn.); **In re Guliano,** 156 F. 420 (U. S. D. C., S. D. N. Y.); **United States v. Mirsky,** 17 F. 2d 275, 276 (U. S. D. C., S. D. N. Y.); **In re Nagy,** 3 F. 2d 77, 78 (U. S. D. C., S. D. Tex.); **Application of Polivka,** 30 F. Supp. 67 (U. S. D. C., W. D. Pa.); **Petition of Zele, supra;** and **Repouille v. United States,** 165 F. 2d 152 (C. C. A. 2).

The respondent agrees that Congress has fixed the conditions under which naturalization may be granted in order to make certain that the gift of citizenship will be beneficial to the United States, as well as to the alien, **Luria v. United States,** 231 U. S. 9, 23; and that this Court has insisted upon strict compliance with the congressional mandate. **United States v. Ness,** 245 U. S. 319. Congress has prescribed that no alien shall be admitted to citizenship unless he demonstrates that during the five-year period preceding the filing of his naturalization petition, he "has been . . . a person of good moral character, . . . and well disposed to the good order and happiness of the United States." Thus it is clear that proof of good moral character during the five-year period is the only test of moral fitness provided in the statute and that if Congress had intended otherwise, it could have easily so prescribed.

The Court of Appeals held that a person may establish good moral character while he is confined within a penal institution. It is a well known fact that there are good prisoners and bad prisoners. Prison boards universally have recognized this distinction in the class of prisoners by paroling good prisoners prior to the expiration of their maximum sentence and on the other hand withholding this privilege

from other prisoners. In the instant case, it is admitted by the petitioner that the conduct of the respondent was exemplary during his incarceration.

The petitioner contends that since the respondent during his imprisonment was under restraint, continuous observation and subject to rigorous rules and to severe punishment for deviations, and because his activities were narrowly circumscribed, he had no real freedom of choice and could not meet the statutory test. The respondent on the other hand contends that such reasoning is unsound. Would anyone say that a member of the armed forces of the United States, merely because he was under restraint, continuous observation and subject to rigorous rules and to severe punishment for deviations, and because his activities were narrowly circumscribed, could not during his period of service establish good moral character. It is frequently much more difficult to maintain good moral character while confined within prison walls than to maintain it while under no restraint, and in the following case great weight was accorded to the fact that the applicant's "conduct in prison was exemplary." **In re Balestrieri,** 59 F. Supp. 181 (Cal. 1945). In the case of **In re Taran,** 52 F. Supp. 535 (Minn. 1943), a petition for citizenship was filed three and one-half years after the petitioner had been released from prison and the court, although it denied the petition for naturalization, did not even mention the fact that the petitioner had been incarcerated for one and one-half years of the five-year period preceding the application.

There is no doubt but that an applicant for naturalization has the burden of establishing that he has satisfied the prescribed statutory qualifications and that he must demonstrate that he has been a person of good moral character for the five-year period preceding the filing of his petition for citizenship.

Whether or not a petitioner has sustained the burden of proving his good moral character for the statutory period is a question of fact to be determined by the court. It has been held that since the court is entrusted with the bestowal of the gift of citizenship, it should not be bound to any great extent by legal technicalities in determining whether the applicant is qualified; and since the primary purpose of naturalization laws is to grant citizenship only to those who it appears will make good Americans, **the court is in the best position to determine whether this is so in any given case. In re Paoli,** 49 F. Supp. 128 (Cal. 1943). It must be remembered that the responsibility for granting or denying a petition for naturalization is imposed by statute upon the judge, for, although he receives the findings and recommendations of the designated examiner, it is within his province to decide whether to "approve such recommendations" and make such exceptions as he "may deem proper." 8 U. S. C. A. Section 733(b) and **Petition of Zele, supra.**

Since the establishment of good moral characted is a question of fact to be determined by the court, the respondent respectfully submits that the District Court was fully justified in granting his application for citizenship. In addition to other evidence presented, the court had the opportunity to personally observe the respondent. The judgment of the Circuit Court of Appeals affirming the decision of the District Court should not be reversed unless there has been a clear and unreasonable abuse of discretion. Such was not the situation in the instant case.

CONCLUSION

In view of the evidence in this case and the above cited cases, the respondent respectfully submits that there was no abuse of discretion and that the petition for naturalization was duly granted in accordance with the statute; therefore, the respondent prays that this petition for a writ of certiorari be denied.

MICHELE DADDONA

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April, 1949.